

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
MICHAEL ROBERT KLARKE,)	CASE NO. 04-36627 HCD
)	CHAPTER 7
DEBTOR.)	
)	
)	
JAMES BUSSE and)	
CATHERINE BUSSE,)	
)	
PLAINTIFFS,)	
vs.)	PROC. NO. 05-3018
)	
MICHAEL ROBERT KLARKE,)	
)	
DEFENDANT.)	

Appearances:

R. William Jonas, Jr., Esq., attorney for plaintiffs, Hammerschmidt, Amaral & Jonas, 137 North Michigan, South Bend, Indiana 46601; and

Doug A. Bernacchi, Esq., attorney for defendant, 450 St. John Road, Suite 109, Michigan City, Indiana 46360.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 12, 2006.

Before the court is the Motion for Summary Judgment filed by the defendant Michael Robert Klarke on February 21, 2006. The defendant seeks summary judgment of the Complaint to Determine Dischargeability of Debt, filed by the plaintiffs James and Catherine Busse on March 22, 2005. No response to the Motion for Summary Judgment was filed. For the reasons that follow, the court grants summary judgment to the defendant and dismisses the plaintiffs' Complaint.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and

determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The plaintiffs, in their Complaint, alleged that a judgment entered by the Lake Superior Court found fraud, and that damages from the fraud were established at \$37,500 and attorney fees at \$11,000. *See* R. 1. The plaintiffs asserted that they were creditors of the debtor by virtue of that judgment and that the judgment debt was nondischargeable under 11 U.S.C. § 523(a)(2)(A), (4), and (6). Although the state court's determination of fraud was central to the plaintiffs' Complaint, they did not attach the judgment to their Complaint. *See id.* In his Answer, the defendant admitted that the plaintiffs were his creditors, by virtue of that judgment, but denied all other allegations. He presented six "affirmative defenses," one of which was that "there was no evidence of fraud presented at trial." R. 5 at 1. He also claimed that the Complaint failed to state a claim upon which relief could be granted. *See id.*

The defendant's Motion for Summary Judgment stated that there was "no finding of fraud" and "no dispute as to the fact that there was and is no basis upon which to allege fraud and therefore a cause of action under Section 523 of the Code." R. 31 at 1. The defendant insisted that there were no facts in dispute and no basis for relief for the plaintiffs. In his Brief in Support of Defendant's Motion for Summary Judgment, he presented a few facts concerning the underlying state court case and his subsequent bankruptcy filing. He then argued that there was no basis in fact for finding the debt to the plaintiffs nondischargeable. *See id.*, Brief at 2-3. The plaintiffs did not respond to the defendant's summary judgment motion.

Discussion

The court considers whether the defendant's Motion for Summary Judgment, to which no response was filed by the nonmovant plaintiffs, should be granted.

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. See *Anderson*, 477 U.S. at 248. "To avoid summary judgment . . . the nonmoving party [is] required to set forth 'specific facts showing that there is a genuine issue for trial,' Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position." *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that real factual disputes exist, the nonmovant must produce evidence of the disputes rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L. B. R. B-7056-1. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Underscoring the requirement of Rule 56(e) that a nonmoving party present some evidence to demonstrate that there are triable issues before the court, Rule B-7056-1 of the Local Rules of the United States Bankruptcy Court for the Northern District of Indiana requires a nonmovant's response.

. . . Any party opposing the motion [for summary judgment] shall, within thirty (30) days of the date the motion is served upon it, serve and file a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue, supported with appropriate citations to

discovery responses, affidavits, depositions or other admissible evidence, together with any affidavits or other documentary material controverting the movant's position. The "Statement of Genuine Issues" may either be filed separately or as a part of the responsive brief

N.D. Ind. L.B.R. B-7056-1; *see Barber*, 236 B.R. at 663 (citing earlier local rule and Seventh Circuit case law supporting trial court's discretion concerning strictness of the rule). Under this local rule, "if a summary judgment respondent fails to file a timely statement of disputed material facts, uncontroverted statements in the moving party's statement in support of summary judgment are deemed admitted." *Barber*, 236 B.R. at 663 (citing *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 412 (7th Cir. 1997)). Indeed, courts generally treat all material facts as admitted when no response is filed and the facts are thereby uncontroverted. *See, e.g., West v. Grindstaff (In re Grindstaff)*, 254 B.R. 706, 708 (Bankr. S.D. Ohio 2000); *Novartis Corp. v. Luppino (In re Luppino)* 221 B.R. 693, 696 (Bankr. S.D. N.Y. 1998).

In this case, the court finds that the plaintiffs, by not responding to the defendant's motion for summary judgment, failed to comply with the local bankruptcy rule and federal rules and thereby admitted all the material facts in the motion. They did not demonstrate that a genuine issue must be tried. Crucially, they failed to show that the state court "found fraud" and that a "portion of the state court judgment related to fraud." R. 1 at 1. The element of fraud is "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The plaintiffs did not produce even a scintilla of evidence of fraud. They failed to produce the necessary document, the state court judgment or order, to validate their claim of fraud.

The court found it noteworthy that neither party produced the judgment of the Lake Superior Court; nor did either party present to the court a single legal argument with a citation to a case or a statute. The court considered rejecting the possibility of deciding this case on a motion for summary judgment, on the ground that the record was incomplete and inadequate for a summary determination. However, it was the burden of the plaintiffs, first in their Complaint and then in a response to the Motion for Summary Judgment, to produce the evidence of the state court's alleged finding of fraud. The plaintiffs failed in their burden of proof in this regard.

At a later stage, the plaintiffs had the job of proving that the state court's finding of fraud fit within the Bankruptcy Code's § 523 exceptions to discharge, but it had the initial burden of showing the judgment. When the defendant filed his summary judgment motion, he alleged that the state court did not find evidence of fraud and that the plaintiffs "sought to have the state court order include a finding of fraud by filing their Motion to Correct Errors, which under Indiana Rules of Civil Procedure was denied after state court has failed to grant said motion." R. 31, Brief, at 2. The plaintiffs were required to respond to the allegations in this motion by demonstrating specific facts showing the existence of a genuine issue for trial. By not doing so, they failed to shoulder their burden of proof.

The uncontested facts in the summary judgment motion, now deemed as admitted, lead to the unchallenged conclusion that there was no finding of fraud by the state court and no evidence of fraud by the plaintiffs. The court finds, therefore, that the plaintiffs' lack of response defeats their case. It determines that there is no genuine issue as to the material fact of fraud and that the moving party, the defendant, is entitled to judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56(c).

The court therefore grants the Motion for Summary Judgment of the defendant Michael Robert Klarke and dismisses the Complaint of the plaintiffs James and Catherine Busse.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT